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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. IAN DAVIS HUDGINS, Defendant and Appellant.	E059858 (Super.Ct.No. INF1100805) O P I N I O N

APPEAL from the Superior Court of Riverside County. Jeffrey L. Gunther, Judge. (Retired judge of the Sacramento Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed.

Randi Covin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Eric A. Swenson, Kristine A.

Gutierrez, and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

In 2013, a jury convicted defendant and appellant, Ian Davis Hudgins, of the first degree, special circumstance murder of 17-year-old Jahi Collins on December 21, 1994, (Pen. Code, §§ 187, subd. (a), 190.2, subd. (a)(15))[1] and of the premeditated attempted murder of 19-year-old Robert (Bobby) Wilson, Jr. (§§ 664, 187, subd. (a)). Gang enhancements were found true in both counts. (§ 186.22, subd. (b).)

Defendant was tried as an aider and abettor to the crimes. The prosecution claimed that defendant, a founding member of the West Drive Locos criminal street gang, drove his mother's Buick Regal through Wardman Park in Desert Hot Springs on the night of December 21, 1994. The perpetrators of the crimes, Emilio Avalos and Sergio Padilla (Sergio), were defendant's passengers. Shortly thereafter, Avalos and Sergio entered the park on foot and shot Collins and Wilson, killing Collins and paralyzing Wilson. The prosecution claimed that defendant dropped Avalos and Sergio off near the park shortly before the crimes occurred, knowing that Avalos and Sergio planned to shoot and kill Collins and Wilson. Defendant testified that, after he drove through the park with Avalos and Sergio as his passengers, he took Avalos and Sergio to Avalos's house several blocks north of the park and that he then drove himself home, not knowing that

[1] All further statutory references are to the Penal Code unless otherwise indicated.

Avalos and Sergio were going to shoot Collins and Wilson. No witnesses saw defendant or his mother's Regal in or near the park at the time of the shooting or afterward. Shoe impression evidence indicated that Avalos and Sergio walked southward through a concrete storm channel on the west side of the park, stepped up onto a dirt pathway next to the storm channel, and entered the park on foot through a hole in a chain-link fence. Tire impressions found on the shoulder of 8th Street south of the park, where the storm channel crossed under 8th Street, were not matched to the Regal, and a witness saw another vehicle speed away from the park on 8th Street shortly after shots were fired.

Defendant was sentenced to six years in prison for the gang enhancements, plus 25 years to life for the attempted murder of Wilson, plus life in prison without the possibility of parole for the murder of Collins. On appeal, defendant raises numerous claims of error. We reverse because we conclude that the prosecutor prejudicially erred in his third and final argument to the jury.

After the jury reported for the second time that it was "hopelessly deadlocked" and also reported without being asked that its vote was evenly split at six to six, the court excused the jury for the day. On the following morning, each side was allowed to present a 10-minute additional argument. (Cal. Rules of Court, rule 2.1036.)

At the beginning of his additional argument, the prosecutor told the jury: "I want to press on you a few things. 19 years; 600,735 days; that's how long the Collins family has waited for justice. [¶] . . . Objection. . . . [¶] . . . [¶] . . . We want closure in this case. We want a verdict in this case. *We do not want six weeks of time, your time, our*

time, witness time, to be kicked down the road only to do this all over again. [¶] . . . Objection. . . . [¶] . . . [¶] . . . We want a verdict in this case. It's as simple as that. [¶] . . . Objection." (Italics added.)

Defense counsel objected to the argument on several grounds, including improper argument, appealing to the emotions of the jury, and "[m]isconduct." After twice being admonished by the court to "[m]ove on," the prosecutor remonstrated against defense counsel's "misconduct" objection, and the trial court responded by saying, in front of the jury, "It's not misconduct." As we explain, the prosecutor's argument constituted misconduct under state law. The argument improperly appealed to the jury's emotions and demanded verdicts from the jury because so much time and effort had been expended in prosecuting the case and because the case would have to be retried, wasting additional time and resources, unless the jury returned guilty verdicts.

The prosecutorial error was prejudicial under the *Watson*[2] standard. For several reasons, there is a reasonably probability—more than an abstract possibility—that defendant would have realized a more favorable result—a hung jury—absent the prosecutorial error.

First, the errors were not cured by the trial court's instructions. Though the jury was given CALCRIM No. 3550 before it began its deliberations and was similarly instructed following its first deadlock, the jury was not instructed to disregard the prosecutor's improper argument despite defense counsel's request for a curative

[2] *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).

admonition, and no further instructions were given following the improper argument. It is reasonably likely that the jury interpreted the improper argument as allowing it to return guilty verdicts based on the irrelevant expediency of avoiding the time and expense of another lengthy trial. The jury returned the guilty verdicts before the end of the day on which the improper argument was made.

Further, the evidence of defendant's guilt was by no means overwhelming and left much room for reasonable doubt of his guilt. Neither Avalos nor Sergio testified, and the prosecution's case relied largely on vague and inconclusive out-of-court statements Avalos made to his former girlfriend, Cynthia Henry (Cynthia), and to another gang member, Samuel Ortiz, saying defendant "was there" and that defendant dropped Avalos and Sergio off outside of Wardman Park before the shootings. Ortiz had a motive to embellish Avalos's (unrecorded) out-of-court statements to him because he testified against defendant pursuant to a plea bargain with prosecutors.

II.

FACTUAL BACKGROUND

A. Preliminary Observations

Defendant was not charged in the 1994 Wardman Park shooting until 2007. At the time of defendant's trial in April and May 2013, Avalos had recently been convicted and sentenced to death for the unrelated murder of Henry Lozano in 2001. In the same trial, Avalos was convicted of the murder of Collins and the attempted murder of Wilson. Avalos did not testify at defendant's trial because his convictions were on appeal and his

attorney was not allowing anyone to speak with him. Sergio's whereabouts were unknown; he was believed to have fled to Mexico.

We describe the evidence presented at the trial in detail in order to provide a complete picture of the evidence, and the lack of evidence, of defendant's guilt.

B. Prosecution Evidence

1. Expert Gang Testimony

(a) *Investigator Ryan Monis*

Ryan Monis, an investigator with the Riverside County District Attorney's gang homicide unit, testified as a gang expert for the prosecution. Investigator Monis was familiar with the West Drive Locos, and opined that it was an "active" criminal street gang on and before December 21, 1994. In December 1994, the West Drive Locos had 10 to 15 active participants. It was founded in 1992 by a group of "youngsters" in the Palm Springs Unified School District who lived around West Drive in Desert Hot Springs. Its founding members included defendant, Avalos, Sergio, Samuel Padilla (Samuel), Alejandro Escobar, Emanuel Dublin, David Gazcon, and Francisco Salcido. In 1994, the territory of the West Drive Locos included Wardman Park in Desert Hot Springs.

Originally a part of the Browns Town Locos, the West Drive Locos gang broke away from the Browns Town Locos, and the gangs became bitter rivals. Avalos was the "shot caller" for the West Drive Locos, and Sergio was "probably a close second." Investigator Monis opined that defendant, Avalos, and Sergio were active participants in and members of the West Drive Locos on December 21, 1994.

On February 23, 1993, Avalos, Sergio, and defendant committed a burglary in West Drive Locos territory. They were throwing rocks, and one of the rocks broke the sliding glass window of a house, allowing them to enter. They entered the house and took television sets and other electronic equipment. The burglary showed defendant's association with the West Drive Locos.

Investigator Monis had spoken with defendant, had arrested him, and was aware that defendant had been interviewed several times by law enforcement officers. In a May 1, 2007 interview, defendant told Investigator Thomas Reid from the Riverside County District Attorney's Office that the West Drive Locos was formed around November 1993.

In other interviews with Investigator Reid, defendant expressed "[a] lot of knowledge" of the West Drive Locos gang, its members, and its activities. Defendant admitted to Investigator Reid that he hung out with West Drive Locos members; he was at Wardman Park "all the time"; he got into multiple fights with Browns Town Locos members; and he was "always basically at war" with Browns Town Locos members. Defendant also told Investigator Reid that he used to "chase those Brown Town guys all the time and that he would drive his mom's car with guns hanging out the window chasing Brown Town Locos."

On December 1, 1994, Sergio, Avalos, and defendant were involved in an incident at Palm Springs High School in which they were "chasing" Browns Town Locos members. Defendant was stopped by the police while driving his mother's car with Avalos and Sergio as his passengers. When defendant was booked into jail on January 25, 1995, apparently for reasons unrelated to the December 1, 1994 incident at Palm Springs High School or the

December 21, 1994 shooting, he told the classification officer that he was a member of the West Drive Locos gang and he did not get along with the Browns Town Locos.

In January 2004, defendant was shot outside the Lucky Dog Tattoo Parlor where he worked by members of the Browns Town Locos in retaliation for his "possible involve[ment]" in shootings involving the Browns Town Locos. In 2006, defendant talked to Investigator Reid about his 2004 shooting and the deaths of other Browns Town Locos members and said: "[N]one of us . . . have . . . been killed, but Brown Town has." Defendant also said he had been "jumped" by members of the Browns Town Locos "many times." On another occasion, members of the Browns Town Locos "shot up" defendant's house, and defendant retaliated by going onto the roof of the house with a Tech 9, an illegal assault weapon, and firing back at the Browns Town Locos.

According to Investigator Monis, everyone who knew Avalos described him as the "shot caller" or leader of the West Drive Locos. While being booked into jail on March 24, 2002, Avalos said he was from the West Drive Locos and that he did not get along with Blacks. In wire-tapped, recorded telephone calls in 2006, while Avalos was being investigated for "multiple homicides," including the December 21, 1994 Wardman Park shooting, Avalos used derogatory terms to refer to African-Americans, which, according to Investigator Monis, was consistent with the view of the West Drive Locos. It was "pretty well known" that members of West Drive Locos did not get along well with Black gangs or Black individuals; they would view a Black male "partying on their turf" as a sign of disrespect.

Given a hypothetical mirroring the facts surrounding the Wardman Park shooting, Investigator Monis opined that the murder of Collins and the attempted murder of Wilson were committed in association with and for the benefit of the West Drive Locos, within the meaning of section 186.22, subdivision (b)(1). He explained that, in the hypothetical, the crimes were carried out by three individuals who were all associates, active participants, or members of the gang at the time of the shooting. Further, the shooting benefitted the gang by elevating its status, because it was a homicide, "high level" gang-type crime. Additionally, the shooting occurred in gang territory and instilled fear and intimidation in other gangs and in the community. "This [was] a gang crime."

(b) *Lieutenant Timothy Salas*

Riverside County Sheriff's Lieutenant Timothy Salas testified briefly as a gang expert. When he worked in Desert Hot Springs from 1988 to 1996, the West Drive Locos and Browns Town Locos were the two main rival gangs in the city. The West Drive Locos started in the early 1990's, after Avalos, his father John, and his brother Mark moved to West Drive. "Boys" affiliated with the gang, including defendant, would congregate at the Avalos house—the house was "like a common meeting place." Around that time, Lieutenant Salas arrested Avalos for weapons charges, and arrested Avalos, Sammy, and Sergio for robbery. Lieutenant Salas had spoken to Avalos's parents and to "the boys" about redirecting the boys' behavior. John Avalos would "down play" the boys' behavior.

In the early 1990's, Lieutenant Salas responded to an alarm call at defendant's mother's house. In talking with defendant's mother, Lieutenant Salas mentioned defendant

and said: "You know, he's hanging out with the wrong crowd. And you need to really do something, because he's hanging out with West Drive." The mother told the lieutenant that defendant was a very talented artist and showed him a drawing defendant had made of "West Drivers" who had been hanging out at the Avalos house with defendant. The mother said: "You know, Deputy, he is what he is. He's a West Driver. I just have to face that, and that's what he is. But look at this [drawing]." Lieutenant Salas agreed that defendant was a very talented artist.

Lieutenant Salas opined that West Drive Locos was a criminal street gang on and before December 21, 1994. There were repeated incidents in that time period involving members of West Drive Locos and Browns Town Locos, and Lieutenant Salas responded to some of the incidents. On July 4, 1994, or 1995, Lieutenant Salas saw a fight involving West Drive Locos members at Wardman Park. Another time, he arrested Avalos, Sergio, and Sammy after recognizing them on a surveillance tape from a liquor store robbery. And, on January 22, 1995, he arrested Avalos for possession of a concealed knife or dagger. Lieutenant Salas was one of the first officers who arrived at Wardman Park following the December 21, 1994 shooting.

2. Additional Gang-related Testimony

On September 28, 1994, Palm Springs Police Officer Jason Hapner contacted Avalos and Sergio at the Palm Springs Mall, located across the street from Palm Springs High School. There had been a lot of fighting between Hispanics and Blacks at the high school and the fights were "spill[ing] over" into the mall. Officer Hapner had contacted

hundreds of gang members and filled out field identification (FI) cards, documenting the gang members' appearance, statements, and activities. Officer Hapner completed FI cards for Avalos and Sergio on September 28, 1994.

The FI cards indicated that both Avalos and Sergio claimed membership in the West Drive Locos, were both armed, and were both wearing white Nike shoes. Most of the gang members Officer Hapner had contacted were wearing white or black Nike Cortez shoes. Officer Hapner also wrote on FI cards that Avalos and Sergio were "hanging inside the Palm Springs Mall with [four] other [West Drive Locos] members probably for a fight retaliation against Browns Town Locos."

3. Bobby Wilson's Testimony

Wilson had known defendant and Sergio since his childhood. Wilson had never had any problems with defendant, but he did not like Sergio or Sergio's brother Sammy. Four to five years before the December 21, 1994 Wardman Park shooting, Wilson was in several fistfights with Sergio, and Wilson always won the fights. Wilson once beat up both Sergio and Sammy after Sammy tried to help Sergio in the fight. Defendant was not present during any of these fights. Wilson first met Avalos in 1992, and Avalos did not like Wilson, but Wilson and Avalos never fought.

According to Wilson, Sergio, Sammy, Avalos, and defendant founded the West Drive Locos gang in 1990 or 1991. The West Drive Locos members called the Avalos house their "headquarters." Defendant was living with the Avalos family before the

December 21, 1994 shooting. Neither Collins nor Wilson claimed membership in any gang.

A week and a half before the December 21, 1994 shooting, there was a riot between Blacks and Hispanics at the Palm Springs Mall. Wilson, who was White, joined the fight to help his friend Collins, who was Black, and several other Blacks who were outnumbered by the Hispanics. Avalos and Sergio were there, but defendant was not. Wilson saw Collins beating Avalos, and Avalos's sister was trying to separate Avalos and Collins when Collins accidentally punched Avalos's sister in the eye. To Wilson's knowledge, that was the only fight that had ever occurred between Collins and Avalos. Wilson did not know of any altercations between Collins and defendant.

Wilson and Collins went to Wardman Park at around 9:00 p.m. on December 20, 1994 to meet two girls. Collins was 17 years old at the time and Wilson was two to three years older. Wilson knew that the West Drive Locos claimed the park as its territory, but Wilson did not consider the gang to be a threat because most of its members were physically smaller than Wilson and Collins.

Around 10:00 p.m. at Wardman Park, Wilson was sitting on the hood of Collins's car while Collins "was messing with" one of the girls in the backseat. The other girl had talked to Wilson, but had gone back to sit in her car. While Wilson was sitting on the hood of Collins's car, defendant drove through the park very slowly in a brown, "American model older vehicle," with Sergio in the front passenger seat and Avalos in the backseat. Avalos, Sergio, and defendant were "mad-dogging" Wilson, and Wilson

was "mad-dogging" them back. Wilson jumped off the hood and threw up his hands as if to say, "What's up, man?," "What's going on?," or "Is there a problem?"

Wilson approached the vehicle that defendant was driving, and the vehicle sped up and left the park, but it returned eight to 10 minutes later, "[d]rove through the same way, turned around, slowly both times, [and] left out of there slow." As Wilson approached the vehicle again, it sped up again. On its second trip through the park, defendant, Avalos, and Sergio were still in the same places in the vehicle and were "[j]ust looking" at Wilson.

Minutes later, Collins got into the driver's seat of his car, and the girl Collins was with went back to her car. Wilson was sitting in the front passenger seat of Collins's car, next to Collins, for eight to 10 minutes when Wilson saw a flash and heard a loud noise on the driver's side of the car. Multiple shots hit Collins and Wilson. Wilson saw a couple of bullets go through Collins before they hit Wilson. Wilson "spit out bullets, teeth," and was bleeding from six or seven different bullet holes. Collins was dead. The girls left in their car.

Wilson then saw two gunmen approaching the car on foot, still shooting. Wilson could not move his legs. He rolled out of the car and "Army" crawled eight or nine yards, where Avalos approached him and fired another round at his head, which barely missed. As Avalos approached Wilson as Wilson lay on the asphalt, Avalos pulled his mask or cap off, and Wilson looked "right at" Avalos. Wilson did not see defendant or defendant's car at the time of the shooting, but fewer than 15 minutes passed between the

time defendant's car made its second pass through the park and the shooting. As a result of the shooting, Wilson was paralyzed and uses a wheelchair.

At the scene of the shooting and in the hospital after the shooting, police officers asked Wilson whether he knew who shot him. Wilson said he did not know. On several subsequent occasions, Wilson told officers he did not know who shot him. Wilson testified he did not tell the officers who shot him because he believed that would have made him a "rat, snitch, piece of shit." Soon after the shooting, however, Wilson told his uncle who shot him, and in 1995 his uncle beat up defendant while defendant and the uncle were in jail.

In the years following the shooting, Wilson planned to retaliate against Avalos and Sergio, but he only wanted defendant to admit to him that defendant was involved. Many times Wilson confronted defendant about the shooting, but defendant never expressly admitted to Wilson that defendant was involved. On several occasions, including in 2010, defendant apologized to Wilson, saying, "I'm sorry for what happened to you, Bobby." He also told Wilson he "didn't want any of that to happen." Wilson did not "hold the same hostilities towards [defendant]" that he did against Avalos and Sergio, in part because he knew defendant was "only the driver."

Wilson first told law enforcement officers that Avalos shot him in 2006, when two officers came to interview Wilson while he was in prison. The officers told Wilson there had been a break in the case. Specifically, Avalos's former girlfriend was seeing a marine, Henry Lozano, and she had revealed that Avalos told her that he was "going to

do to [Henry] Lozano like he did [Wilson] and [Collins]." During the 2006 interview, Wilson told the investigators that he saw Avalos walk up and shoot at his head, barely missing, as he lay on the ground paralyzed. Avalos was wearing a mask, but lifted it up before firing so Wilson could see his face. Wilson also told the investigators that 15 minutes before the shooting, defendant twice drove slowly through the park in an older model car with Sergio in the front passenger seat and Avalos in the backseat, and all of them were "mad-dogging" him.

Wilson decided to tell the officers who shot him in 2006 because by that time he had "changed" "[f]or the better." At the time of defendant's trial in May 2013, Wilson had 10 felony convictions. Following his release from prison in 2007, he soon violated parole and ended up back in prison. He had been to prison three times and was last paroled in 2010.

4. Forensic Evidence

Numerous shell casings were found at the crime scene. Collins died as a result of multiple gunshot wounds to the head and chest.

Riverside County Sheriff's Detective Mark Peters oversaw the measuring and photographing of shoe and tire impressions found in and near Wardman Park during the early morning hours of December 21, 1994. The park was bordered by 8th Street on the south, 12th Street on the north, Cactus Street on the east, and a concrete storm channel running in a southwest/northeasterly direction on the west. A chain-link fence separated the storm channel from the park and a dirt pathway ran along both sides of the storm

channel. The storm channel ran under 8th and 12th Streets, and there were locked gates to the storm channel at 8th and 12th Streets.

Multiple shoe impressions with a zigzag pattern were found on the dirt pathway on the east side of the storm channel, leading southward from 12th Street, and continuing through a hole in the chain-link fence that separated the storm channel and dirt pathway from the park. More shoe impressions with the same zigzag pattern were found near the baseball field inside the park and approaching the crime scene in the parking lot, south of the baseball field. These shoe impressions made it look as though someone had "walked down the storm channel through the hole in the fence" and to the crime scene. The hole in the fence was "[e]asily" large enough for a person to pass through. All of the shoe impressions were made by Nike Cortez shoes.

The tire tracks "circled from" 8th Street onto the dirt shoulder north of 8th Street and to the park fence, then circled back to 8th Street. Shoe impressions similar to the ones found heading south on the dirt pathway and through the hole in the fence were found at the locked gate at 8th Street and the storm channel. None of those shoe impressions led to the crime scene. The tire and shoe impressions near 8th Street made it appear as though someone had left a vehicle on 8th Street, walked to the locked gate of the storm channel, and walked back to the vehicle.[3]

[3] Detective Peters did not know when the tire impressions were made or what kind of vehicle made them. Four tracks of tire impressions near the locked 8th Street gate were photographed.

An expert on shoe print identification testified that the zigzag impressions were made by the distinctive soles of Nike Cortez shoes. The Cortez was one of Nike's most popular shoes in the 1990's, especially among 15 to 30 year olds. Certain colors were popular among gang members. Nike made millions of pairs of Cortez shoes between 1972 and the 1994 shooting.

5. Avalos's Out-of-court Statements to Cynthia, Ortiz, and Others

(a) *Avalos's Statements to Cynthia*

Cynthia Henry, also known as Cynthia Miranda, met Avalos in 1994 or 1995 and had a daughter with him in 1997. Before she met Avalos, Cynthia had heard that Avalos was responsible for the Wardman Park shooting. Once in 1995 or 1996 she asked Avalos if he had ever killed anyone. Avalos "smirked" and said he had killed "Jahi" (Collins) and paralyzed "Bobby Wilson" and that Sergio and defendant "were . . . there." Avalos told Cynthia that he and Sergio were the shooters and that defendant was the driver.

Avalos also told Cynthia that "they" fell asleep after the shooting, but she did not recall Avalos telling her who fell asleep, or whether "they" fell asleep in the car, the park, or elsewhere. She just knew that Avalos told her "they were all there," meaning Avalos, Sergio, and defendant, and she was focused on the fact Avalos had killed someone, not on what Sergio or defendant were doing or the details of the crimes.

The 1995 or 1996 occasion was the only time Avalos discussed the Wardman Park shooting with Cynthia, but she heard Avalos "bragging with his friends" on several subsequent occasions. She did not recall whether defendant was present during any of

the "bragging" conversations. Nor did she recall ever hearing defendant discuss the Wardman Park shooting with Avalos or anyone else.

On June 3, 2005, Cynthia told Investigator Reid that Avalos told her defendant was "involved" in the Wardman Park shooting, but she was uncertain how defendant was involved. Investigator Reid recalled the June 3, 2005 interview the same way: Cynthia said she did not recall how defendant was "involved" in the shooting. Investigator Reid's report of the 2005 interview did not indicate how Cynthia said defendant was involved. Investigator Reid was unable to find any report by any law enforcement officer, prior to his own June 3, 2005 report, that memorialized Cynthia's discussion of the Wardman Park shooting.

Cynthia testified she first told the police about Avalos's statements to her in 2001, after her fiancé Henry Lozano was murdered that year. Between 1997, when her daughter was born, and 2001, Cynthia's relationship with Avalos was "[h]orrific." According to Cynthia, Avalos was not arrested for Lozano's murder until "[a]lmost a decade" after 2001. Cynthia believed Avalos killed Lozano, but he never admitted it to her. Avalos and other West Drive Locos gang members called defendant "the down white boy," meaning he "wasn't afraid to do anything."

(b) *Avalos's Statements to Ortiz (Not in Recorded Calls)*

Samuel Ortiz moved to Desert Hot Springs around 1999 or 2000, when he was 17 years old, and he began hanging around with members of the West Drive Locos,

including Avalos and Sergio. Ortiz met defendant around 2003 and knew he was from West Drive Locos.

Ortiz testified he and Avalos hung out together lots of times and bragged about their crimes. On several occasions, Avalos told Ortiz about the Wardman Park shooting. Avalos said he shot a Black guy and a White guy in the park in December 1994; the Black guy was killed and the White guy was paralyzed. Avalos said he and Sergio were the shooters, and defendant "drove them." More specifically, Avalos told Ortiz that defendant drove Avalos and Sergio to the side of the park "where the trees are at" by the baseball diamond and behind the dirt road; that Avalos and Sergio "jumped the fence, went across the field, snuck across the field around the snack bar, walked up to the guys, and shot them . . . when they were in the car." Avalos said he and Sergio were "almost crawl[ing]" across the field to the snack bar when the sprinklers came on. They saw some girls, but kept going and shot at "the guys in the car," then took off running.

Avalos told Ortiz that it took so long for Avalos and Sergio to complete the shooting that defendant fell asleep in the car. Avalos and Sergio ran away, then came back to the crime scene later. Avalos never told Ortiz that defendant drove Avalos and Sergio away from the crime scene, or what defendant did after the shooting, and Avalos never told Ortiz that defendant knew what Avalos and Sergio were going to do or that they intended to shoot Collins and Wilson. Avalos described the shooting in the same way to Ortiz on several occasions. Ortiz had never discussed the crimes with defendant.

(c) *Avalos's Recorded Calls*

Investigator Reid began investigating the 2001 Lozano murder and the 1994 Wardman Park shooting after he joined the Riverside County District Attorney's Office in 2004. Avalos was the main suspect in the Lozano murder, and in 2006, Cynthia told Investigator Reid that Avalos told her he shot Collins and Wilson in 1994 with Sergio and defendant.

In order to prove both murder cases against Avalos, Investigator Reid determined he needed more evidence. He began "knocking on everybody's door," including relatives of Avalos, in order to find out what happened in several criminal investigations and to "generate conversation[s] on the wire tap from people who would be talking to the main parties involved." In early 2006, Investigator Reid obtained a court order to wiretap Avalos's telephone for 60 days. Avalos knew police were tapping his telephone; he said so whenever anyone he was talking with began to discuss criminal activity.

Three recorded telephone calls were played for the jury, transcripts of the calls were provided to the jury, and Investigator Reid testified concerning the import of the statements made in the calls. Defendant was not a party to any of the calls.

In a March 12, 2006 call with Francisco Salcido concerning Sergio's suspected snitching, Avalos said: "We gotta fucken hide crews at night and wait outside somewhere where we know where he's at." According to Investigator Reid, Avalos was planning to ambush Sergio the same way he had ambushed Lozano: he and other gang

members had stalked Lozano for a week before finally ambushing him outside Cynthia's apartment early one morning.

In a March 16, 2006 call, Ortiz, who was in jail, and Avalos, who was at his house in Desert Hot Springs, discussed their pending cases, along with Avalos's cousin, Vincent Avalos. At one point in the conversation, Avalos told Ortiz he trusted him like a brother. To Investigator Reid, the call showed that Avalos trusted Ortiz, and this made Reid "feel comfortable that information that was shared [with Ortiz] would be accurate and would come from the source [Avalos] rather than just somebody in the jail giving me information."

In the March 16, 2006 call, Avalos also said: "They're trying to get me for armed robbery and for . . . that shit, too." A moment later, Avalos clarified: "[T]hey're trying to blame [me] for that murder." It was significant to Investigator Reid that Ortiz apparently knew what murder Avalos was talking about. Avalos said police officers told his girlfriend (not Cynthia) that someone in the jail was talking. Avalos and Ortiz talked about who might be "snitching," and Avalos suggested that, among other people, Sergio and defendant might be snitching. After Ortiz told Avalos that defendant had been in court, apparently to testify against the people from the Browns Town Locos who shot him in 2004, Avalos said: "I know already. That fool [defendant], he's on borrowed time." Avalos also said he had not spoken to defendant in a long time.

Investigator Reid testified that many of the statements Avalos made in the March 16, 2006 call about who was snitching had the "ring of truth," because officers will tell

suspects when someone in jail is talking, and in March 2006 officers were talking to many potential witnesses in the investigation of Avalos. Officers were "knocking on doors" and talking to many of Avalos's relatives and associates, hoping to generate incriminating conversations on the wiretap.

In a May 2, 2006 call with Ortiz and David Delgado, both of whom were in custody, Avalos talked more about snitching. Avalos said he knew Sergio had talked because police officers had asked Avalos about things only he and Sergio knew. Avalos said he "can't do nothing to [Sergio] because the cops [were] all over [Avalos's] place[.]" Avalos said he wanted to "snatch" Sergio and roll him up in black plastic sheeting he kept in his garage for emergencies.

Ortiz testified that the Wardman Park shooting was the only crime he knew of that Avalos and Sergio committed together, and in all of the many hours of calls he had with Avalos, Sergio and defendant were the only people Avalos threatened. But in the May 2, 2006 call, Avalos also talked about a murder involving handcuffs. Avalos was worried that his DNA was on the handcuffs and on duct tape used in the murder. Investigator Reid testified that Andrew Clark, a West Drive Locos gang member, told police officers that Gabriel Lima was "handcuffed and driven out to the desert, and a bullet was put in the back of his head," and that duct tape was used on the wrists and mouth of one of the armed robbery victims.

Though Avalos's statements in the recorded calls indicated he believed he could trust Ortiz, Ortiz was "snitching" on Avalos. Ortiz was in jail in 2006 because he and

Delgado were charged with the first degree murder of Lloyd Davis. Ortiz was almost 21 years old when he went into custody in 2004, and he was facing a sentence of 84 years to life for the Davis murder. In January 2006, Ortiz's attorney contacted Investigator Reid, looking for a "deal." Thereafter, Ortiz provided information about a lot of people, and Investigator Reid spent several months investigating and corroborating the information.

On June 7, 2007, after the information provided by Ortiz was corroborated, Ortiz was offered and signed a plea agreement: his murder charge for the Davis murder was reduced to voluntary manslaughter with a firearm enhancement and a sentence of 21 years, in exchange for his truthful testimony against Delgado, Avalos, defendant, and others in multiple cases, including the Wardman Park shooting. Investigator Reid testified that Ortiz's description of the Wardman Park shooting, as relayed to Ortiz by Avalos, matched the physical evidence and the statements of others, including Wilson and Cynthia.

As a result of his statements and testimony, Ortiz received threats on his life, including some from West Drive Locos. Shortly before testifying at Avalos's trial, which concluded before defendant's trial, Ortiz saw defendant in the jail through a big window. According to Ortiz, defendant gestured with his finger across his throat. Defendant testified that he never threatened Ortiz, though he once told Ortiz to "fuck off" because Ortiz said, "Fuck your mom," "[f]uck you," and made rude gestures—i.e., a middle finger and a simulated gun.

Sheriff's Sergeant Sergio Magdaleno worked in the jail classification department, regulating the placement of inmates in various housing assignments. He was aware of a reported incident where defendant was looking through a window into another section and said something like, "Fucking punk."

Investigator Reid testified that Ortiz's testimony concerning what Avalos told him about the December 21, 1994 shooting was "consistent with what I found from the investigation and accurate." Other information from Ortiz helped to solve several previously unsolved homicides in Desert Hot Springs. Investigator Reid was not aware of any information Ortiz provided in any case that was not corroborated. Thus, he recommended Ortiz as an informant after "corroborat[ing] . . . his truthfulness and accurate information."

C. Defense Evidence

1. The Girls' Testimony

Jennifer Mullens, also known as Jennifer Dugger, testified that she and Maya Sepe were with Collins and Wilson at Wardman Park the night of the shooting. They arrived at the park around 12:45 a.m. on December 21, 1994. Around 30 minutes later, Mullens saw a gold and white Buick Regal drive through the parking lot, turn around, and go back out. There were three people in the car; the driver and two passengers. They had shaved heads and looked like Hispanic "gangbangers." They were "mad-dogging" Collins and Wilson, staring them down. There was no confrontation as the Regal drove through the parking lot; no one made any hand gestures or said anything. Thirty minutes later,

Mullens saw the same car on Cactus Street, the street that borders the park on the east, apparently circling the park. She saw the same car again 15 minutes later.

Mullens had a bad feeling about the car; she thought it looked like its occupants were getting ready to "do a drive-by." Mullens pointed out the car to Collins, Wilson, and Sepe. All of them prepared to leave. Just as Mullens got into Sepe's car and Wilson got into Collins's car, two people dressed completely in black with black face masks and small handguns walked out from behind the snack bar. Mullens heard multiple gunshots. She ducked down and pulled Sepe's head down. Sepe shifted her car into reverse and backed out of the park. When the gunfire stopped, Mullens looked up and saw two guys running toward the baseball field, to the left of the snack bar. She did not see any cars enter or leave the park around the time of the shooting.

Sepe testified she did not remember anything about the shooting. The only thing she could recall for sure was that she "never saw anyone's face." She drove her car that night and met Collins and Wilson, along with Mullens. Her car was hit by two bullets.

2. William Potts's Testimony

William Potts testified that he heard two gunshots near Wardman Park when he drove a friend home after work at around 1:00 a.m. on December 21, 1994. Potts walked his friend to her door. When he walked back to his car, he saw one or two people sitting in an older blue Chevy Nova near the steps coming down from the park. The driver of the Chevy Nova looked Hispanic. Potts did not see the driver's face, but it was not

defendant, whom Potts had known since childhood; Potts and defendant had been friends in middle school but had not seen each other in years.

After a couple of seconds, the Nova took off down the street, "[v]ery fast. Bat out of hellish." Potts did not see anyone get into the Nova, but the shooters could have run from the park toward the baseball field and out to the Nova between the time the shots were fired and the Nova left.

3. Forensic Evidence

Riverside County Sheriff's Deputy Arman Morales was the first officer to arrive at Wardman Park following the shooting, and he began securing the crime scene. Sergeant Adam Elders and Lieutenant Salas arrived soon afterward. None of the officers who secured or investigated the crime scene recalled seeing any vehicles leaving the area of the park. Sergeant Elders testified that they usually secured a large area first and worked their way inward to avoid contamination of the crime scene. He taped off the inner area of the crime scene while Lieutenant Salas secured the outer area. To Sergeant Elders's knowledge, no one was found sleeping in a car.

Pablo Encino worked for the City of Desert Hot Springs Public Works Department beginning in 1997, and had observed young people walking in the canal behind Wardman Park and climbing through holes in the fence.

4. Defendant's Testimony

Defendant testified that he had nothing at all to do with the shooting. He admitted he drove his mother's brown Cutlass Supreme past Wardman Park to a convenience store

with Avalos and Sergio around midnight on December 21, 1994. He then drove into the parking lot of the park. He had just bought some "weed" and wanted to smoke it in the parking lot, but there were people in the park whom he did not recognize. It was dark and all he could see was that there were males and two females.

Defendant felt uncomfortable getting high around people he did not know so he made a U-turn and went back out of the parking lot. No one approached the car, said anything, made any gestures, or mad-dogged anyone. Defendant dropped Avalos and Sergio off at Avalos's house, then drove himself home. He was shocked when he heard about the shooting several days later.

In 2007, Investigator Reid asked defendant about the 1994 shooting. Defendant told Investigator Reid that he had driven through the park with Avalos and Sergio. His statement to Investigator Reid was consistent with his trial testimony, though not as detailed. He told Investigator Reid he was high: "We got all fucked up. I was all fucked up on dope and we were out fucking around, you know. That's what kids do." He was using drugs constantly around the time of the shooting, and he had used speed earlier that day.

Defendant met Wilson when he was seven or eight years old. He met Avalos when he was 16 years old and his family moved into Avalos's neighborhood in Desert Hot Springs. He began spending time at the Avalos house, playing pool and smoking "weed" with Avalos and his friends, including Sergio. He started getting into trouble, skipping school, and using methamphetamine and marijuana.

In February 1993, defendant's mother kicked him out of her home. He moved in with the Avalos family and slept on their couch for a few weeks until he was arrested for burglary. He claimed he and other boys entered what they thought was an abandoned house next door to the Avalos house and took some property they found inside. He went to juvenile hall and then to a placement called Boys Republic for a year.

Around August 1994, defendant was back in Desert Hot Springs living with his mother. Things had changed among his friends. Some of his friends were in the West Drive Locos gang and others were in a rival gang, Browns Town Locos. According to defendant, his friends "didn't like each other anymore" and "had become enemies."

Defendant denied he was ever a gang member. He had friends in West Drive Locos and Browns Town Locos and he "hung out with" West Drive Locos. He told jail booking officers he hung out with West Drive Locos and was having problems with Browns Town Locos because he had been involved in some fistfights with Browns Town Locos members and he wanted to avoid problems in jail. His statements to Investigator Reid about fighting with Browns Town Locos members were exaggerated. He never drove around in his mother's car with guns hanging out of the windows. He never chased a Browns Town Locos member in his mother's car, as Investigator Monis claimed; he was waiting to make a left turn when Sergio jumped out of the car and started chasing someone on foot. Defendant followed Sergio, who explained after the fact that he was chasing a Browns Town Locos member.

Defendant was driving his mother's car another time, on January 25, 1995, when his friend David Quinonez pulled out a small shotgun he was carrying under his coat and pointed it out the window, right past defendant's face, at Adam Munoz. Defendant pushed the gun aside angrily and told Quinonez to get the gun out of his face. When defendant and Quinonez were arrested, defendant told officers that Quinonez was the one who had the gun and threw it out the window just before they were pulled over. Defendant did not know the gun was there before Quinonez pointed it at Munoz. Quinonez corroborated defendant's description of the incident.

Liam Duff's father, Ray Duff, testified that defendant was a good friend of Liam's and lived with the Duff family between 1996 and 1998, working for Duff's masonry business. During that time, defendant never got into any trouble and did not have any gang affiliations as far as Duff knew. Avalos never came to the Duff home while defendant lived there. Duff did not know Sergio.

Defendant admitted he had been arrested a few times, for possessing methamphetamine for sale, for public drunkenness, and for possessing a firearm. He admitted the methamphetamine possession and public drunkenness charges, but denied that the gun was his. Police officers found the gun under a chair cushion outside the apartment of Sergio's girlfriend. Defendant was 10 or 12 feet away from the chair and claimed he did not know the gun was there.

Defendant claimed there was only one time he was ever involved in a shooting. He was living in an apartment on Avalos's father's property for a few months in 1998.

One night when he was in bed, someone knocked on his window and said there were people out back. He went outside and someone handed him a gun. When shots were fired at the property, he ran up the stairs to the roof and fired two shots back. Immediately after the shooting, he moved out of the Avalos property. He was scared and did not want to have anything to do with "anything like that." He quit using drugs and stopped hanging around with Avalos. He worked in Palm Springs and elsewhere as a professional tattoo artist—he had been doing tattoo work on his friends since he was 16.

In 2004, defendant was shot while working at a tattoo parlor in Cathedral City. Someone called him out to the street, then some guys started shooting from a car. Two other non-West Drive Locos members were also shot—they were shooting everyone. He never went back to Desert Hot Springs and he stayed away from Avalos. He was surprised when Investigator Reid told him in 2006 that Avalos had "put a hit on" him. Avalos had no reason to want to kill him.

III.

DISCUSSION

A. The Judgment Must Be Reversed Because the Prosecutor Prejudicially Erred During His 10-minute Additional Closing Argument

1. Relevant Background

On May 28, 2013, after the jury had been deliberating for less than two days, the jury reported that it was unable to reach a verdict. The court further instructed the jury on the deliberations process, ordered it to continue its deliberations, and the jury resumed its

deliberations for the rest of the day.[4] On the morning of May 29, the court replaced one juror with an alternate juror,[5] and instructed the new jury to begin deliberating "from the beginning." The new jury began deliberating shortly before 10:00 a.m., and at 2:21 p.m., the jury reported it was "hopelessly deadlocked" and reported without being asked that it was "an even split 6-6."

Over defense counsel's objection, the court granted the People's motion to submit additional argument.[6] (Cal. Rules of Court, rule 2.1036.) The court excused the jury for the rest of the day with the understanding that it would return the next morning and resume deliberating after listening to 10 minutes of additional argument from both sides. On May 30, each side presented 10 minutes of additional argument.

The prosecutor's additional argument began as follows:

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[4] Before the jury resumed deliberations, the court answered a question from the jury and ordered a readback of Ortiz's testimony concerning what Avalos had told him, as the jury had previously requested.

[5] The replaced juror reported having a family emergency.

[6] In objecting to allowing the parties to give additional argument before declaring a mistrial, defense counsel pointed out that the six-to-six "impasse" was "quite significant," and a "pretty huge split."

"[THE PROSECUTOR]: . . . I only have ten minutes, so I need to move fast. I'm not going to cover a whole lot with you. I want to press on you a few things. 19 years; 600,735 days;[7] that's how long the Collins family has waited for justice.

"[DEFENSE COUNSEL]: Objection. Improper argument. Appealing to the emotions of the jurors.

"THE COURT: Let's move on from this.

"[THE PROSECUTOR]: We want closure in this case. We want a verdict in this case. *We do not want six weeks of time, your time, our time, witness time, to be kicked down the road only to do this all over again.*

"[DEFENSE COUNSEL]: Objection. Improper argument. Appealing to the emotions of the jury.

"THE COURT: Move on.

"[THE PROSECUTOR]: We want a verdict in this case. It's as simple as that.

"[DEFENSE COUNSEL]: Continuing objection, Your Honor. Misconduct. Admonition, please.

"THE COURT: Move on.

"[THE PROSECUTOR]: Your Honor, we need to put this on the record. If she's alleging misconduct, we need to find . . . .

"THE COURT: It's not misconduct.

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7 Nineteen years is 6,935 days (19 x 365 = 6.935.) It thus appears that the prosecutor said six thousand seven hundred thirty-five days, not six hundred thousand seven hundred thirty-five days as the reporter's transcript indicates.

"[THE PROSECUTOR]: Of course it's not. Alleging misconduct is misconduct. This has been a long time, a long road, and we want justice in this case.

"[DEFENSE COUNSEL]: Objection, Your Honor.

"[THE PROSECUTOR]: And I'm here . . . .

"[DEFENSE COUNSEL]: Improper argument.

"THE COURT: The objection is overruled." (Italics added.)

After both sides completed their 10-minute additional arguments, the jury resumed deliberating at 9:09 a.m. Thereafter, the jury submitted additional questions to the court, had additional testimony read back, took a nearly two-hour lunch break, and took 10- to 15-minute morning and afternoon breaks. At 3:36 p.m., the jury returned its guilty verdicts.

2. Applicable Law and Analysis

Defendant claims the prosecutor committed prejudicial misconduct by "press[ing] on" the jury the Collins family had been waiting "19 years" for justice, that much time and effort had been expended in prosecuting the case, and that the case would have to be retried, requiring more time and effort, unless the jury returned guilty verdicts. We agree that these portions of the prosecutor's argument constituted prejudicial misconduct under California law.[8]

[8] Defendant has preserved his claim of prosecutorial misconduct for appellate review because his defense counsel timely objected to the prosecutor's argument as it was being made and requested that the jury be admonished to disregard the improper argument. "To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is

The standard under which prosecutorial misconduct is evaluated is well settled. "A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under [California] law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. . . . [W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Morales* (2001) 25 Cal.4th 34, 44; *People v. Johnson* (2016) 62 Cal.4th 600, 652.)

Prosecutors "are held to an elevated standard of conduct." (*People v. Hill*, *supra*, 17 Cal.4th at p. 819.) They "are held to a standard higher than that imposed on other attorneys because of the unique function they perform in representing the interests, and in exercising the sovereign power, of the state." (*People v. Sanchez* (2014) 228 Cal.App.4th 1517, 1529.) The role and responsibilities of a prosecutor were described in *Berger v. United States* (1935) 295 U.S. 78, 88: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern

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reviewable only if an admonition would not have otherwise cured the harm caused by the misconduct." (*People v. Farnam* (2002) 28 Cal.4th 107, 167, internal quotations omitted.) We are also mindful that a determination of bad faith or wrongful intent by the prosecutor is not required for a finding of prosecutorial misconduct. (*People v. Hill* (1998) 17 Cal.4th 800, 822-823.)

impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

"Prosecutors 'are allowed a wide range of descriptive comment and the use of epithets which are reasonably warranted by the evidence' [citation], as long as the comments are not inflammatory and [are not] principally aimed at arousing the passion or prejudice of the jury [citation]." (*People v. Farnam, supra*, 28 Cal.4th at p. 168.) "'It is, of course, improper [for a prosecutor] to make arguments to the jury that give it the impression that "emotion may reign over reason," and to present "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role . . . ."'" (*People v. Redd* (2010) 48 Cal.4th 691, 742.)

More specifically, "it is misconduct for a prosecutor to argue that the jury in a noncapital case . . . or in the guilt phase of a capital case—should consider the impact of the crime on the victim's family. [Citations.]" (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1193.) Yet this is precisely what the prosecutor did in emphasizing to the jury that the Collins family had waited 19 years for justice, and by concomitantly suggesting to the jury that it should find defendant guilty for that reason.

The prosecutor's remark that the Collins family had waited 19 years for justice had nothing to do with the evidence of defendant's guilt and was squarely aimed at

arousing the passion of the jury. (See *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057 ["an appeal for sympathy for the victim is out of place during an objective determination of guilt"]; *People v. Fields* (1983) 35 Cal.3d 329, 362-363 ["the bounds of vigorous argument do not permit appeals to sympathy or passion . . . ."].) The prosecutor's emphasis on the number of days that had passed since Collins's 1994 murder made the argument all the more emotionally charged. The argument was misconduct under California law because it employed a reprehensible method to persuade the jury—an emotional appeal to allow the jurors' sympathies for the Collins family's long wait for justice to influence the verdicts. (See *People v. Fields*, *supra*, at pp. 362-363.)

The prosecutor's improper argument did not end with his improper reference to the Collins family's long wait for justice. Immediately thereafter, the prosecutor told the jury: "*We do not want six weeks of time, your time, our time, witness time, to be kicked down the road only to do this all over again*." (Italics added.) This argument was also improper because it urged the jury to return guilty verdicts because so much time and effort had been invested in the case, and because more time and effort would be wasted *in retrying the case* if the jury did not break its deadlock and return guilty verdicts.

"Statements indicating the case must at some time be decided present 'a significant danger that the verdict will be influenced by a false belief that a mistrial will necessarily result in a retrial' and the concomitant expense to the government." (*People v. Hinton* (2004) 121 Cal.App.4th 655, 660, citing *People v. Gainer* (1977) 19 Cal.3d 835, 855 (*Gainer*), disapproved on another point in *People v. Valdez* (2012) 55 Cal.4th

82, 163.) In *Gainer*, our state Supreme Court disapproved of jury instructions that state or imply that the case will necessarily be retried if the jury remains deadlocked. (*Gainer*, *supra*, at p. 852.) Such instructions commonly refer to the "expense and inconvenience of a retrial," and are impermissible because they are irrelevant to the issue of the defendant's guilt or innocence. (*Id*. at p. 852 & fn. 16.) Though the improper remarks in *Gainer* were made by the trial judge, not the prosecutor, our state Supreme Court has indicated that the principles articulated in *Gainer* apply with equal force to remarks by prosecutors. (*People v. Boyette* (2002) 29 Cal.4th 381, 436; *People v. Sanchez*, *supra*, 228 Cal.App.4th at p. 1531, fn. 3.)

The *Watson* standard of reversible error applies in assessing the effect of the prosecutor's improper arguments, which for the reasons indicated constituted misconduct under California law.[9] (*People v. Sanchez*, *supra*, 228 Cal.App.4th at p. 1534.) Under the *Watson* standard, "[e]rrors under California law are prejudicial when 'it is reasonably probable that a result more favorable to the [defendant] would have been reached in the absence of the error.'" (*People v. Sanchez*, *supra*, at p. 1534, citing *Watson*, *supra*, 46 Cal.2d at p. 836.)

In this context, a reasonable probability of a more favorable result means there is "'a *reasonable chance*, more than an *abstract possibility*'" of a more favorable result.

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9 Given our conclusion that the prosecutor's improper arguments constituted misconduct under California law, it is unnecessary to reach defendant's additional claim that the arguments violated his due process right to a fair trial under the Fourteenth Amendment to the federal Constitution. (*Gainer*, *supra*, 19 Cal.3d at p. 852.)

(*People v. Soojian* (2010) 190 Cal.App.4th 491, 519.) If there is a reasonable probability the defendant would have realized a more favorable result absent the error, then a miscarriage of justice has occurred under the California Constitution, and reversal is required. (*Watson*, *supra*, 46 Cal.2d at p. 836; Cal. Const., art. VI, § 13.) A hung jury is a more favorable result than a guilty verdict. (*People v. Soojian*, *supra*, at p. 520.)

In order to determine whether there is a reasonable probability defendant would have realized a more favorable result absent the prosecutorial error, we examine "all [of] the circumstances under which" the improper arguments were made. (*Gainer*, *supra*, 19 Cal.3d at p. 855.) For the reasons we explain, the improper arguments require reversal.[10]

Before the prosecutor's improper arguments were given, the jury twice reported it was "hopelessly deadlocked," and in reporting its second deadlock reported without

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[10] Had the prosecutor confined his improper remarks to the Collins family's 19-year wait for justice, and had the court sustained defense counsel's "improper argument" objection to those remarks, we might agree that the prosecutor's improper remarks were isolated and not prejudicial. In *People v. Pensinger* (1991) 52 Cal.3d 1210, the prosecutor "improperly appealed to the passion and prejudice of the jury in closing argument" by asking the jury to suppose the victim had been one of the juror's children. (*Id*. at p. 1250.) Though the appeal to the jury's passion was misconduct, there was no reasonable probability it affected the verdicts because the court sustained defense counsel's "speaking" objection to the remarks and told the prosecutor to "go on to another subject." (*Id*. at pp. 1250-1251; *Watson*, *supra*, 46 Cal.2d at p. 836.) "This was a telling indication to the jury that the argument was improper and to be disregarded." (*People v. Pensinger*, *supra*, at p. 1251.) Here, in contrast to *Pensinger*, the prosecutor's improper arguments were not isolated; the court overruled defense counsel's objections to the improper arguments; and the court told the jury the improper arguments were "not misconduct" It is reasonably likely that the jurors understood the court's overruling of defense counsel's objections and the court's "[i]t's not misconduct" remark as meaning the prosecutor's improper arguments *were proper* and *were not to be disregarded*. (Cf. *id.* at pp. 1250-1251.)

being asked that its vote was evenly split at six to six. The jury reached its guilty verdicts before the end of the day on which the improper arguments were made. This indicates there is at least a reasonable probability or a reasonable chance—more than an abstract possibility—that the improper arguments persuaded the jury to return guilty verdicts.

Additionally, no curative admonition was given directing the jury to disregard the prosecutor's improper arguments—despite defense counsel's request for a curative admonition—and the error was not cured by the other instructions. Though the jury was given CALCRIM No. 3550 before it began its deliberations and was similarly instructed following its first deadlock, the jury was not instructed to disregard the improper argument despite defense counsel's request for a curative admonition, and no further instructions were given following the improper argument. Rather than tell the jury to disregard the improper argument, the court apparently approved of the improper argument by failing to remind the jury, at this critical point in the trial, that it should reach verdicts only if it could do so, and that its verdicts, if any, should reflect the individual opinions of each juror. (CALCRIM No. 3550.)[11]

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[11] Notwithstanding the court's failure to give a curative instruction and its comment that the prosecutor's improper arguments were "not misconduct," we reject defendant's claim that the court's conduct amounted to a "de facto *Allen* [*v. United States* (1896) 164 U.S. 492, 501-502] charge." As indicated, improper "*Allen-type*" charges include instructions that state or imply that the case will be retried if the jury remains deadlocked, and such instructions may refer to the expense and inconvenience of retrying the case. The court did not adopt the prosecutor's improper arguments by overruling defense counsel's objections, or by telling the jury the arguments were not misconduct, though the court's "[i]t's not misconduct" comment made it all the more likely that the jury construed the prosecutor's improper arguments as allowing it to return guilty

Additionally, the evidence that defendant aided and abetted Avalos and Sergio in the commission of the crimes was inconclusive, and far short of overwhelming. (Cf. *People v. Houston* (2012) 54 Cal.4th 1186, 1222 [error not reversible under *Chapman v. California* (1967) 386 U.S. 18 or *Watson* standard in view of overwhelming evidence of defendant's guilt].) In order to find that defendant aided and abetted the alleged perpetrators Avalos and Sergio in committing the crimes, the jury was instructed pursuant to CALCRIM No. 401 that it had to find (1) the perpetrators committed the crimes, (2) defendant knew the perpetrators intended to commit the crimes, (3) before or during the commission of the crimes, defendant intended to aid and abet the perpetrators in committing the crimes, and (4) defendant's words or actions did in fact aid and abet the perpetrator's commission of the crimes. The evidence that defendant dropped Avalos and Sergio off outside the park knowing they were about to shoot Collins and Wilson, or that defendant picked up Avalos and Sergio after the shooting, knowing the shooting had occurred and intending to help Avalos and Sergio evade detection, was vague and left much room for reasonable doubt.

To be sure, defendant admitted he drove Avalos and Sergio through Wardman Park in his mother's older model Regal shortly before the shooting, and Wilson testified that as defendant, Avalos, and Sergio drove through the park they "mad-dogged" or

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verdicts based on the irrelevant expediency of saving the government the time and expense of retrying the case.

glared at Wilson and Collins. Jennifer Mullens, one of the girls who was with Collins and Wilson at the park, testified it looked like the Regal was "about to do a drive-by." There was also ample evidence that defendant, Avalos, and Sergio were founding members of the West Drive Locos criminal street gang and that the gang claimed the park as its territory. Avalos did not like Blacks and Collins was Black; Avalos disliked Wilson; and Wilson had beaten up Sergio on several prior occasions.

But uncontroverted evidence also showed defendant did not know Collins and that Wilson and defendant had never had any problems with each other. Defendant claimed he dropped Avalos and Sergio off at Avalos's house near 14th Street, several blocks north of the park, after defendant, Avalos, and Sergio drove through the park and that defendant then drove himself home. Most significantly, no witnesses saw defendant or his mother's Regal anywhere near the park at the time of the shooting or afterward.

Potts testified he saw a blue Chevy Nova parked on 8th Street, south of the park and near the steps to the park, shortly before he heard gunshots, and that an Hispanic man with a ponytail was in the driver's seat of the Nova. Potts knew defendant and testified that the man in the Nova was not defendant. Minutes after he heard gunshots, Potts saw the Nova take off "[v]ery fast. Bat out of hellish," heading west on 8th Street. The evidence also permitted a reasonable inference that Avalos and Sergio walked to the park through the storm channel and entered the park through the hole in the fence, after defendant dropped them off at Avalos's house several blocks north of the park.

Additionally, Cynthia's and Ortiz's testimony about what Avalos told them about defendant's role in the shooting were vague and did not clearly implicate defendant as an aider and abettor to the shooting. Avalos only told Cynthia and Ortiz that defendant was "there" and that "they," including defendant, "fell asleep after the shooting." According to Ortiz, Avalos told him that defendant was "the driver," that defendant dropped Avalos and Sergio off outside the park before the shooting, and that defendant fell asleep in the car after the shooting. But Ortiz's testimony, though it matched the physical evidence of the tire tracks left on the shoulder of 8th Street, was of doubtful credibility because Ortiz had entered into a plea agreement in part in exchange for his testimony against defendant. Avalos's statements to Ortiz and others in the 2006 recorded telephone calls also did not clearly implicate defendant as an aider and abettor to the 1994 shooting.

B. It Is Unnecessary to Reach Defendant's Other Claims of Error

Our conclusion that the judgment must be reversed due to prejudicial prosecutorial misconduct during closing argument means it is unnecessary to address defendant's claim that the jurors committed misconduct in considering *other* extraneous information during its deliberations. In a motion for a new trial, the defense presented declarations from two jurors who claimed that on May 30, the day the jury reached its verdicts, others jurors discussed the time it took two jurors to walk from the courthouse to get coffee with the time it should have taken Avalos and Sergio to walk to Wardman Park, commit the shooting, and walk back to Avalos's house without being detected. It is also unnecessary to consider defendant's claim that the trial court abused its discretion in denying his

petition to unseal juror contact information so the defense could obtain additional information concerning the jurors' alleged misuse of extraneous information in bringing the new trial motion.

Given our reversal of the judgment, we also decline to address defendant's claims that the trial court prejudicially erred in (1) allowing Cynthia and Ortiz to testify to out-of-court statements by Avalos implicating defendant as the driver in the 1994 shooting, on the ground the statements did not qualify as statements against Avalos's penal interest (Evid. Code, § 1230),[12] (2) refusing to exclude Avalos's statements to Cynthia and Ortiz as unduly prejudicial under Evidence Code section 352, (3) allowing Investigator Reid and the prosecutor to vouch for the credibility of Ortiz regarding Avalos's statements to Ortiz, (4) restricting defense counsel's impeachment of Ortiz and Avalos, (5) excluding third party culpability evidence, (6) allowing Lieutenant Salas to testify to testimonial hearsay—the statement by defendant's mother to Salas that defendant was a "West Drive Locos" member—as basis evidence to support his expert opinions, and (7) the cumulative effect of these errors deprived defendant of a fair trial.

IV.

DISPOSITION

The judgment is reversed.

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[12] In 2011, this court issued a peremptory writ in the first instance and a written opinion directing the trial court to vacate its order excluding Avalos's hearsay statements to Cynthia and Ortiz and directing the court to admit the statements against defendant as statements against Avalos's penal interest. (Evid. Code, § 1230; *People v. Superior Court* (*Hudgins*) (Aug. 31, 2011, E054011) [nonpub. opn.].)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.